

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

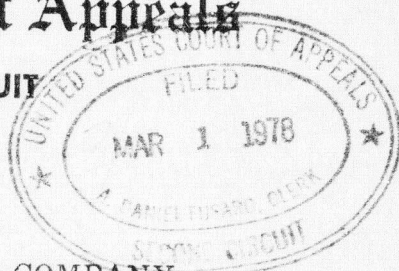
77-6201

To be argued by
ELAINE C. BUCK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6201



GREAT AMERICAN INSURANCE COMPANY,
Plaintiff-Appellant,
—against—

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLEE

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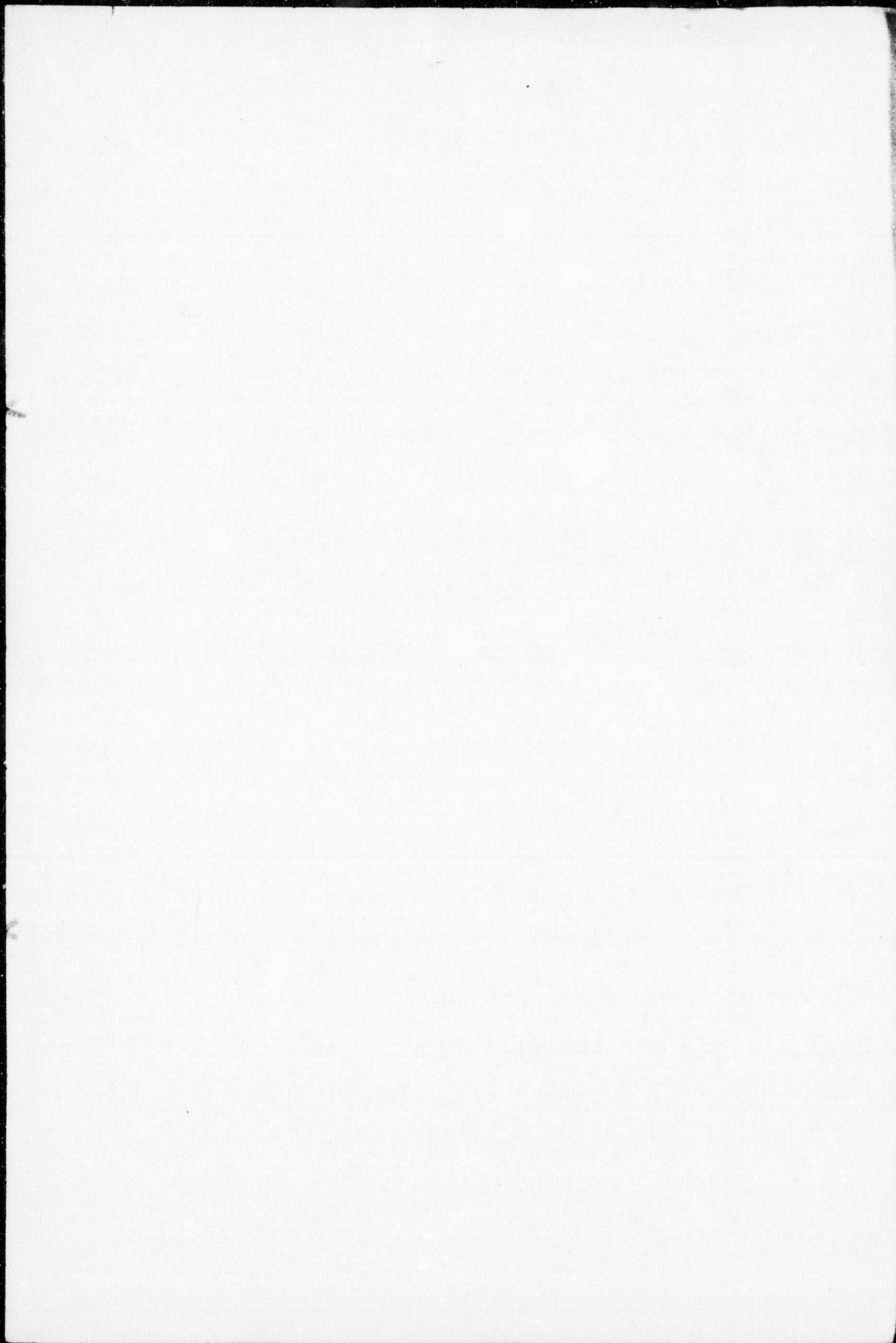


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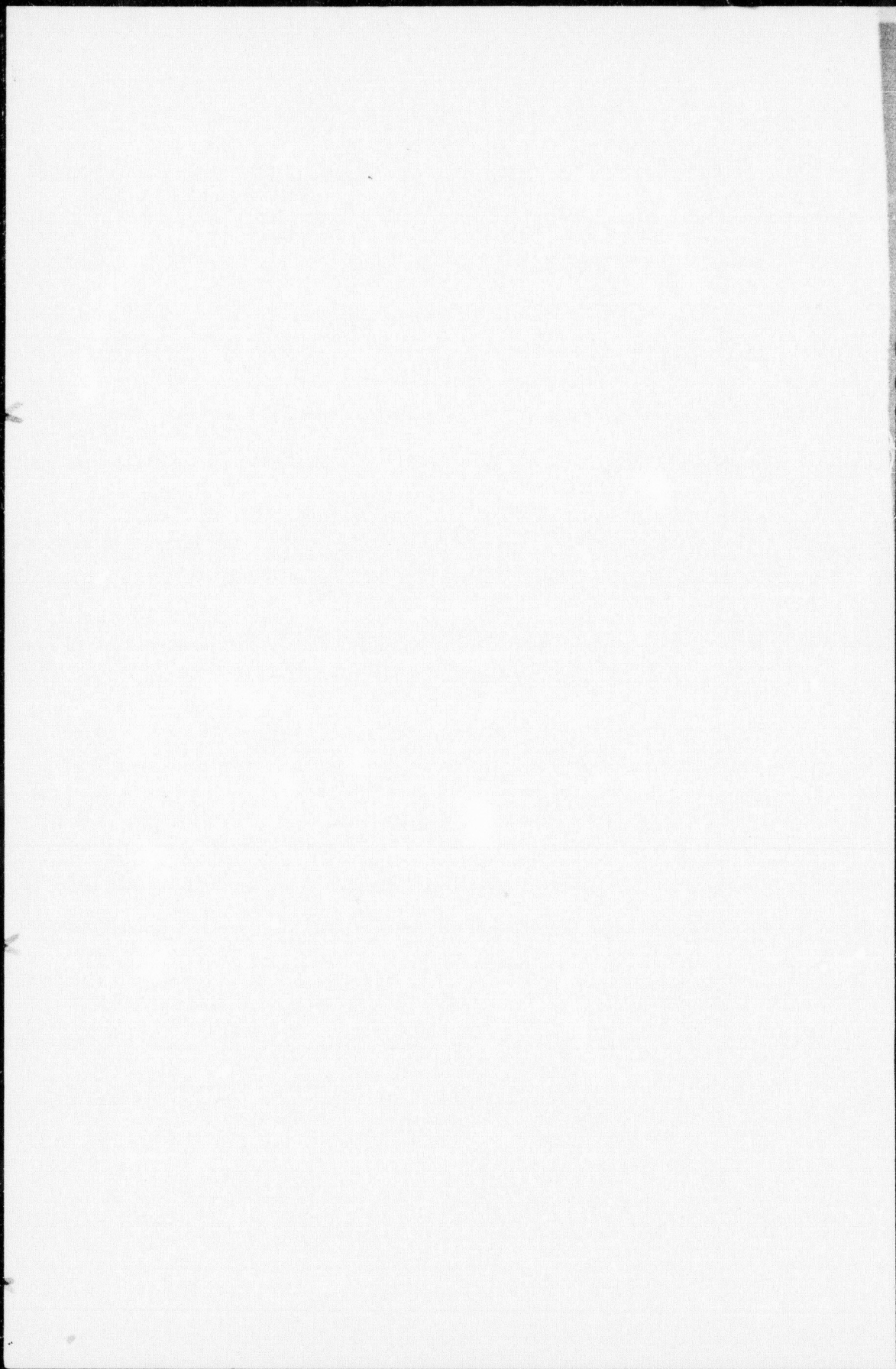
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**United States Court of Appeals
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Docket No. 77-6201

GREAT AMERICAN INSURANCE COMPANY,
Plaintiff-Appellant,
—against—

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR THE DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (George C. Pratt, *J.*) dismissing plaintiff's complaint under the Federal Tort Claims Act for failure to file a timely administrative claim. Judgment was entered by the Clerk of the District Court on November 1, 1977 in conformity with the Memorandum of Decision and Order of the district judge of that date.¹

Statement of the Case

Plaintiff Great American Insurance Company commenced this action on December 16, 1976 alleging, in pertinent part, that it was the insurer of a building in

¹ The judgment and the unreported opinion are set forth in the joint appendix at 32a and 24a, respectively.

West Hempstead, New York; that in late 1972 or early 1973 the tenants of said building were placed under Government protection in connection with a crime investigation; that in early January 1973 the tenants vacated the building under the direction and supervision of the United States Marshals Service and, in the process, caused extensive damage; and that as a result of the damage a claim was made upon the plaintiff by the owner and mortgagees, which the plaintiff rejected (4a-7a). The complaint further alleges that, thereafter, the owner and mortgagees of the premises sued the plaintiff in state court; that on December 15, 1975 the plaintiff paid the owner and mortgagees \$18,699.80 to settle the lawsuit; and that as a result of the payment, the plaintiff became subrogated to the rights of the insureds (4a-7a). The complaint also sets forth that on May 21, 1976, plaintiff filed a claim as subrogee with the Marshals Service and that that claim was denied on November 10, 1976 (8a).

On March 18, 1977, defendant filed a motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim for which relief may be granted on the ground that the action is barred by 28 U.S.C. § 2401(b), since a claim was not filed against the United States until more than two years after the alleged negligent acts or omissions (10a-11a, 26a).

On March 31, 1977, while the above-described motion was pending, plaintiff filed an amended complaint alleging, as an additional cause of action, a right of indemnification from the United States (16a).

On November 1, 1977, the district court granted defendant's motion to dismiss (32a). In his decision dismissing this action, Judge Pratt held that plaintiff's claim was a claim for subrogation and not a claim for indemnification. As such, plaintiff's claim accrued in January

1973 when the damage occurred and not on December 15, 1975, when the plaintiff settled and paid the insured parties (31a). The court went on to hold that, since the damage occurred more than two years prior to the filing of the claim with the Marshals Service, plaintiff's action is barred by 28 U.S.C. § 2401(b) (31a). This appeal followed.

ARGUMENT

POINT I

Plaintiff's claim is for subrogation and not indemnification and is barred by the applicable statute of limitations.

It is clear, as the district court found, that payment by an insurer of an insured's loss gives rise to a right of subrogation and not a claim for indemnification. *Meredith v. The Ionian Trader*, 279 F.2d 471, 474 (2d Cir. 1960); *Ocean A. & G. Corp. v. Hooker Electro-Chemical Co.*, 240 N.Y. 37, 47 (1925); *American Surety Co. v. Town of Islip*, 268 App. Div. 92 (2d Dept. 1944); *Travelers' Insurance Co. v. McLane*, 240 App. Div. 939 (4th Dept. 1934); *Harper v. Wayman*, 189 Misc. 348 (S. Ct. Broome Cty. 1941). See also 6A Appelbaum, *Insurance Law & Procedure*, § 4051-57 (1972). It is equally clear, as the district court also found, that while the statute of limitations for an indemnification claim runs from the time of payment, the statute of limitations for a subrogation claim runs from the time of the negligent acts or omissions. *United States v. Fcrr & Company*, 342 F.2d 383, 387 (2d Cir. 1965); *Kantlehner v. United States*, 279 F. Supp. 122 (E.D.N.Y. 1967); *Liberty Mutual Insurance Company v. United States*, 290 F.2d 257 (2d Cir. 1961); and *Switzerland General Insurance Co. of Zurich v. Navigazione Libera Trestina*, 91

F.2d 960 (2d Cir. 1937). Thus, since Great American Insurance Company concededly did not file a claim with the Marshals Service until more than two years after the alleged acts of vandalism, this action is, as the district court properly concluded, barred by 28 U.S.C. § 2401(b).

Plaintiff's assertion that this is a classic case of indemnification and that plaintiff is being unfairly discriminated against because it is an insurance company reflects a fundamental misapprehension of the doctrine of indemnification. A right to subrogation arises when one party uses his funds to discharge the obligation of another to a third person. *King v. Pelkofski*, 20 N.Y.2d 326, 333 (1967); *Salzman v. Holiday Inns, Inc.*, 48 A.D.2d 258 (4th Dept. 1975), order modified and order of S. Ct., Monroe Cty., reinstated on dissenting opinion and as so modified, *affirmed*, 40 N.Y.2d 919 (1976). See also 57 N.Y. Jur., Subrogation § 3, p. 37 (1967). In contrast, a right to indemnification arises when a party has discharged a duty which is owed by it but which as between itself and another should have been discharged by the other. *Salzman v. Holiday Inns, Inc.*, *supra*. See also *Rock v. Reed-Prentice Div. of Package Machinery*, 39 N.Y.2d 34, 39 (1976). Indeed, the doctrine of implied indemnification is best understood in terms of its intended purpose "to ameliorate in exceptional circumstances 'the rigor of the rule which forbids recourse between wrongdoers.'" *Burke v. City of New York*, 2 N.Y.2d 90, 95-96 (1956) (Elder, J. concurring).

Here plaintiff's duty to pay damages arose solely out of its contract with its insured and not because of a duty it had breached or was imputed to have breached. To state the case another way, there was no legal relationship between Great American and the United States. *Salzman v. Holiday Inns, Inc.*, *supra*. Hence the only rights Great American acquired were subrogation rights from its insured.

Defendant's position here is fully supported by the court's holding in the analogous case of *Williams v. Globe Indemnity Company*, 507 F.2d 837 (8th Cir. 1974). In that case an employer's insurer, after compensating the employer for loss from embezzlement, sued the culpable employee. In response to the defense that the action was barred since it had been brought more than three years after discovery of the embezzlement, the insurer argued that its claim was for indemnification and accordingly had not accrued until its payment to the insured less than three years before. The court rejected the insurer's characterization of its claim and held that only classic subrogation was involved making the insurer subject to the same statute of limitations as the insured. The court also held that the insurer's cause of action was barred since the insurer had failed to bring the action against the employee within three years of discovery of the embezzlement. See, in addition, *American States Insurance Co. v. Williams*, 278 N.E.2d 295 (Ind. App. 1972). See also *La Marsh v. Maryland Casualty Co.*, 35 Misc. 2d 641, 643 (S.Ct. Queens Cty. 1962); and *Application of Travelers Indemnity Company*, 226 N.Y.S.2d 16 (S.Ct. Kings Cty. 1962).

Plaintiff's reliance on the cases cited in its brief is, as the district court found, wholly misplaced in that, as opposed to this action, "each involved a claim for indemnification by a party who was a participant in the underlying transaction but who, by contract or operation of law had a right to recover from the defendant all or part of the moneys already paid out." (29a). To illustrate, in *United States v. Farr & Company*, *supra*, 342 F.2d 383, a company which had been found liable for the sale of contaminated sugar was held to have a right to indemnification from its agent, whose task it had been to procure the sugar. In *Kantlehner v. United States*, *supra*, 279 F. Supp. 122, 129, the court found that a party did not have a right to indemnification because it had been

charged with active negligence.² In both *Newsum v. Pennsylvania Railroad Co.*, 79 F. Supp. 225 (S.D.N.Y. 1948), and *Chicago Rock Island and Pacific Railroad Co. v. United States*, 220 F.2d 939 (7th Cir. 1955), an employer, who had been held legally liable for injuries suffered by its employee because of a nondelegable duty to provide the employee with a safe work place, was held entitled to indemnification from the active tortfeasor. Similarly, the case upon which plaintiff principally relies, *United States Lines Inc. v. United States*, 470 F.2d 487 (5th Cir. 1972), involved two tortfeasors who each owed duties to the injured party. In that case a shipowner, who had paid a seaman's claim for injuries suffered on board its ship, was held entitled to indemnification from the United States for that portion of the claim which could be attributed to aggravation of the original injuries by the Government's malpractice.

Finally, plaintiff's claim that the district court decision, if affirmed, would result in an injustice because Great American had no way of enforcing its right to sue the actual wrongdoer before December 15, 1975, when it settled with the insureds, is both inaccurate and irrelevant. First, as the district court properly found, "... insurance companies are in the business of taking risks, are aware of statute of limitations problems . . ." (30a). Thus, Great American could and should have both settled with the insureds and filed a claim with the Marshals Service within the two year period prescribed by 28 U.S.C. § 2401(b). Second, Great American could have sued but never did sue the tenants who allegedly vandalized the insured premises. Service could have been effected upon

² This case, as well as the other New York cases cited by plaintiff, was decided before *Dole v. Dow Chemical Co.*, 30 N.Y. 2d 143 (1972).

the alleged wrongdoers under Civil Practice Law and Rules § 308.5. In any event, even if Great American's sole remedy was to recover from the United States and it could not have filed a claim within the statutory period, the district court decision, since it is correct, must be affirmed. As this Court stated in *Liberty Mutual Insurance Company v. United States*, *supra*, 290 F.2d 257, 259, in response to a similar claim made by an insurer, "[i]f relief from operation of the statute is indicated it must be sought from the Congress and not from the courts."

CONCLUSION

The judgment of the District Court dismissing this action should be affirmed.

Dated: Brooklyn, New York
March 1, 1978

Respectfully submitted,

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(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF ~~KINGS~~
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of March 1978 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Rein, Mound & Cotton, Esqs., 130 John Street, New York, N.Y. 10038

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

1st day of March 1978

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861

Qualified in Kings County
Commission Expires March 30, 1979